No. 81-2180

In the Supreme Court of the United States

OCTOBER TERM, 1982

DARLYS PORTER STOUT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the court of appeals was required to accord absolute deference to the district court's post-verdict judgment of acquittal.

2. Whether the court of appeals had jurisdiction to review the district court's conditional grant of a new trial when the district court's judgment of acquittal on the same counts was already before the court of appeals.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. A1-A29, A33-A39) is reported at 674 F. 2d 284. The earlier opinion of the panel is reported at 646 F. 2d 136.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1982. The petition for a writ of certiorari was filed on May 24, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Virginia, petitioner was convicted of submitting a false statement to the Department of Housing and Urban Development (HUD), in violation of 15 U.S.C.

1717, and of mail fraud, in violation of 18 U.S.C. 1341.[1] Petitioner was the owner of a subdivision consisting of 86 lots (Pet. App. A10, A13). In June 1977, she filed an application with HUD for exemption from certain filing requirements under the Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1701 *et seq.* ("the Act").[2] In that statement petitioner represented that no developer of her property owned or had under option or consideration for purchase other land that might be offered as part of a common promotional plan (Pet. 6-7; Pet. App. A10-A11). The evidence at trial showed, however, that petitioner was aware that another individual, Thomas Beasley, qualified as a developer of her subdivision and that Beasley owned additional land that would be marketed under a single promotion with petitioner's property.

Thomas Beasley was the owner of a 460-acre tract of land (Pet. App. A10). In order to obtain an exemption from filing requirements of the Act that was available for subdivisions with fewer than 300 lots, Beasley used three development corporations to sell lots in contiguous subdivisions carved from his property (*id.* at A12). One of the

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[1]At the close of the government's case the district court granted a judgment of acquittal on an additional count of submitting a false statement to HUD in violation of 15 U.S.C. 1717. That count is not at issue in this appeal.

[2]The Act requires subdivision developers to file extensive information about lots that are offered for sale, including information concerning access to the property, the availability of sewer facilities, water, and other utilities, and the nature of improvements to the property that the developer intends to make. Section 1702 allows the Secretary of HUD to exempt certain developers from these requirements where a subdivision contains a small number of lots. The Secretary determined that subdivisions containing fewer than 300 lots would be exempt from the filing requirements. 24 C.F.R. 1710.14 (1974). Such an exemption substantially reduces a developer's filing fee (Pet. App. A10).

subdivisions, consisting of 86 lots, was conveyed to Parkway Development Corporation, of which petitioner was president and sole stockholder (*id.* at A12-A13). Under an agreement between petitioner and Beasley the latter was to receive two-thirds of the profits from the sale of the 86 lots (*id.* at A13). Although this financial interest brought Beasley within the definition of a "developer" of the 86-lot subdivision, petitioner did not disclose the interest in the exemption application she filed with HUD (*id.* at A13).

The evidence indicated that petitioner was aware of Beasley's plan to market both the 86-lot subdivision and his remaining land in other contiguous subdivisions under a common promotional plan. The lawyer who represented petitioner, her husband, and Beasley testified that he specifically called their attention to the certification of the absence of a common promotional plan after he prepared the application for exemption (Pet. App. A14). Incentive Productions, Inc., a promotion company owned by petitioner, engaged in promotional activities with respect to both petitioner's 86 lots and the contiguous subdivisions (*id.* at A12, A15). Incentive Productions received over $66,000 from sale of lots, and petitioner herself received over $40,000 in commissions and reimbursement for expenses (*id.* at A12). The evidence showed that petitioner knew that the same project managers, salesmen, sales offices and bookkeeper were used for all of the subdivisions (*id.* at A15-A16).

Following the jury's return of a guilty verdict the trial court granted a judgment of acquittal, stating that on the evidence before the jury no rational finder of fact could have found proof of guilt beyond a reasonable doubt (Pet. App. A30). The trial court appears to have based that conclusion in part on the fact that petitioner's husband and Beasley had been acquitted in a state court of criminal charges relating to the development scheme (*ibid.*). The trial

court further stated that even if the evidence had been sufficient to support the conviction it would have granted a new trial on the ground that admission of the testimony of certain purchasers of the lots had been erroneous (*id.* at A31-A32).

The government appealed from the judgment of acquittal pursuant to 18 U.S.C. 3731. A panel of the court of appeals affirmed. It held that a district court's post-verdict judgment of acquittal was appealable, but that it should be insulated from review in a manner similar to a nonappealable pre-verdict decision to grant acquittal. Accordingly, the panel held that a post-verdict acquittal based on assessment of the evidence at trial was to be accorded "absolute deference." 646 F. 2d 136, 139-143 (1981).

On rehearing en banc, the court of appeals reversed, with two judges dissenting. The en banc court held that a post-verdict judgment of acquittal should be reviewed according to the same standard used in reviewing a defendant's challenge to a jury's guilty verdict, namely, whether there is substantial evidence, viewed in the light most favorable to the government, to support the verdict (Pet. App. A7). After reviewing the evidence at trial in light of that standard, the court found that there was substantial evidence to sustain the guilty verdict (*id.* at A8-A18). The court also held that it had jurisdiction to review the trial court's conditional grant of a new trial, and that there had been no error in admission of the purchaser testimony and thus no basis for ordering a new trial (*id.* at A18-A22).[3] Accordingly, the court reversed the district court's judgment of acquittal and its conditional grant of a new trial and remanded for reinstatement of the jury's verdict and further proceedings consistent with the court of appeals' opinion (*id.* at A22). The

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[3]The court of appeals interpreted the trial court's statements from the bench as a conditional grant of a new trial. See Pet. App. A36 n.9.

dissenters urged the panel's conclusion that a court of appeals should grant absolute deference to a district court's judgment of acquittal when such a judgment is based on a finding of evidentiary insufficiency (*id.* at A22-A29).

ARGUMENT

1. Petitioner contends first that the court of appeals should have accorded absolute deference to the district court's judgment of acquittal (Pet. 13-24). This contention has no merit. Every court that has addressed the subject, with the exception of the panel below, has held that the proper standard for review of a trial court's judgment of acquittal is the one applied by the en banc court. That standard is whether there was relevant evidence from which the jury could reasonably find the defendant guilty beyond a reasonable doubt, viewing the evidence in the light most favorable to the government. See, *e.g.*, *United States* v. *Dixon*, 658 F. 2d 181, 188 (3d Cir. 1981); *United States* v. *Brandon*, 633 F. 2d 773, 780 (9th Cir. 1980); *United States* v. *Beck*, 615 F. 2d 441, 447-448 (7th Cir. 1980); *United States* v. *Varkonyi*, 611 F. 2d 84, 85 (5th Cir.), cert. denied, 446 U.S. 945 (1980); *United States* v. *Blasco*, 581 F. 2d 681, 684 (7th Cir.), cert. denied, 439 U.S. 966 (1978); *United States* v. *Calloway*, 562 F. 2d 615, 617 (10th Cir. 1977); *United States* v. *Hemphill*, 544 F. 2d 341, 344 (8th Cir. 1976), cert. denied, 430 U.S. 967 (1977). That standard is the same one that this Court has approved in cases in which a criminal defendant challenges a jury's guilty verdict on the ground of evidentiary insufficiency. See *Burks* v. *United States*, 437 U.S. 1, 16-17 (1978); *Glasser* v. *United States*, 315 U.S. 60, 80 (1942).

Petitioner devotes a considerable portion of her petition to questioning the proposition that the government may appeal a post-verdict judgment of acquittal under 18 U.S.C. 3731 (Pet. 14-20). Contrary to petitioner's suggestion,

however, it is well established that the government may do so. See *United States* v. *DiFrancesco*, 449 U.S. 117, 130 (1980); *United States* v. *Scott*, 437 U.S. 82, 91 & n.7 (1978); *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 568 (1977); *United States* v. *Wilson*, 420 U.S. 332 (1975). See also *United States* v. *Rojas*, 554 F. 2d 938, 941 (9th Cir. 1977), and *United States* v. *De Garces*, 518 F. 2d 1156, 1159 (2d Cir. 1975), which were cited by this Court in *DiFrancesco, supra*, 449 U.S. at 130. Even the panel below stated that "any suggestion of nonappealability is foreclosed * * * by a proper reading of the Supreme Court decisions * * *." 646 F. 2d at 137.[4] As this Court recognized in *Wilson, supra*, the legislative history of the 1970 enactment of 18 U.S.C. 3731 "makes it clear that Congress intended to remove all statutory barriers to Government appeals and to allow appeal whenever the Constitution would permit." 420 U.S. at 337. The en banc court of appeals here properly recognized that any standard of absolute deference to the trial court would fail to give effect to the congressional intent underlying the 1970 legislation (Pet. App. A6-A7). See also *United States* v. *Dixon, supra*, 658 F. 2d at 188, in which the Third Circuit observed that the absolute deference standard adopted by the panel in this case "takes away what the statute grants."

Petitioner argues that any standard of review other than absolute deference would interfere with the "sacrosanct" function of the district court (see Pet. 13). Quite the opposite is true. It is the jury's "sacrosanct" role as the sole trier of

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[4]Petitioner makes much of this Court's holding in *United States* v. *Sanabria*, 437 U.S. 54 (1978) (Pet. 16-17). However, *Sanabria* has no relevance to this case. In *Sanabria* the trial court entered a judgment of acquittal prior to a jury verdict and this Court found that the Double Jeopardy Clause barred any further prosecution. In the present case reversal of the judgment of acquittal does not necessitate a retrial, but only a reinstatement of the jury's guilty verdict, so that no double jeopardy problem arises. See *Sanabria, supra*, 437 U.S. at 63; *United States* v. *Wilson, supra*, 420 U.S. at 344.

fact in criminal cases (see, *e.g.*, *Burks* v. *United States*, *supra*, 437 U.S. at 16-17; *Singer* v. *United States*, 380 U.S. 24, 35 (1965) that would be usurped by permitting the trial court to discard the jury's verdict on legally erroneous grounds. The standard of review applied by the en banc court and by other courts of appeals in the cases cited above reflects proper deference to the fact-finding function of the jury, while simultaneously allowing exercise of the conventional function of appellate courts to review conclusions of law. Petitioner's advocacy of an unprecedented standard of review that would accord absolute deference to the trial court, and no deference to the verdict of the jury, does not warrant review by this Court.[5]

2. Petitioner contends (Pet. 24-29) that the court of appeals lacked authority to review the district court's conditional grant of a new trial concurrently with its review of the district court's judgment of acquittal. Petitioner argues that the court of appeals' conclusion that it had jurisdiction to review the conditional grant conflicts with the position of four other circuits, which have held that an order granting a new trial in a criminal case is not appealable (Pet. 25). In support of this argument petitioner cites *United States* v. *Hitchmon*, 602 F. 2d 689 (5th Cir. 1979) (en banc); *In re United States*, 565 F. 2d 173 (1st Cir. 1977); *United States* v. *Alberti*, 568 F. 2d 617 (2d Cir. 1977); and *United States* v.

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[5]Almost as an afterthought, petitioner suggests that if the proper standard of review is not found to be absolute deference, it should be abuse of discretion (Pet. 23-24). Petitioner cites no authority to support application of this alternative standard to review of a trial court's post-verdict judgment of acquittal. As noted in the text, *supra*, all courts of appeals that have considered the question have found the standard of review applied by the en banc court in this case to be the proper one.

Dior, 671 F. 2d 351 (1982). See also *United States* v. *Sam Goody, Inc.*, 675 F. 2d 17 (2d Cir. 1982).[6]

Petitioner's contention is without merit. The cases cited above address only the question whether an order granting a new trial is appealable when standing alone. As petitioner acknowledges (Pet. 24), in none of the cases she cites did the trial court both enter a judgment of acquittal and conditionally grant a new trial on the same counts, as it did in this case. Thus, the court of appeals decision here presents no conflict with the cases cited, there being no reason to suppose that the other circuits would not reach the same result if confronted with the same situation.[7]

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[6]We do not here concede that an order granting a new trial in a criminal case is not a final, collateral order appealable under the doctrine of *Abney* v. *United States*, 431 U.S. 651 (1977), and *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). But as we demonstrate in the text, this case turns on special factors not generally applicable to the appealability of new trial orders, and therefore does not place in issue the correctness of the decisions cited by petitioner.

[7]Of the cases cited by petitioner, only *United States* v. *Dior* might arguably be considered relevant to the present case. However, *Dior* is plainly distinguishable. In *Dior* the district court had granted a post-verdict judgment of acquittal on one count, based on the prosecution's failure to prove the value in United States dollars of certain stolen merchandise. The district court granted a new trial with respect to a different count on the entirely distinct ground that the jury had been given an incorrect instruction. On appeal, the Ninth Circuit upheld the judgment of acquittal and declined to review the new trial order, holding that the latter did not constitute a final judgment and thus was not appealable. Unlike the situation in the present case, the judgment of acquittal and the new trial order in *Dior* related to different counts and raised very different issues. Moreover, the Ninth Circuit does not appear to have even considered the possibility that its jurisdiction to review the judgment of acquittal permitted it to exercise pendent jurisdiction over the new trial order. Thus, *Dior* does not conflict with the present case.

Moreover, the holding of the court of appeals that it had jurisdiction to review the conditional grant of a new trial under the particular circumstances of this case is correct. The court of appeals' exercise of jurisdiction is directly authorized by 28 U.S.C. 2106, which states:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Thus an appellate court that has jurisdiction to review a case is not prevented from reviewing portions of the case that otherwise would be nonappealable. As Moore states:

> The appellate court is not * * * limited solely to a consideration of the order upon which the appeal is based, for its jurisdiction embraces such other orders, although interlocutory and in themselves nonappealable, and such questions as are basic to and underlie the order supporting the appeal.

9 Moore's *Federal Practice* para. 110.25[1], at 270 (2d ed. 1982). Moore goes on to note, "[O]nce a case is lawfully before a court of appeals, it does not lack power to do what plainly ought to be done." *Id.* at 273. See also, *e.g.*, *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 286-287 (1940).

Moreover, although the Federal Rules of Criminal Procedure do not address the scope of review in a case in which the trial court has entered both a judgment of acquittal and a conditional order of a new trial,[8] the court of

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[8] As the en banc court of appeals noted (Pet. App. A18), Fed. R. Crim. P. 33, pertaining to new trials, was last amended in 1966 and thus does

appeals reasonably concluded (Pet. App. A18-A19) that it was appropriate to look for guidance to the Federal Rules of Civil Procedure, since the final judgment rule applies in both criminal and civil cases. Fed. R. Civ. P. 50(c)(1) provides that when a court grants judgment notwithstanding the verdict and conditionally grants a motion for a new trial the finality of the judgment is not affected. An appellate court can review the conditional grant and, where appropriate, "reverse the conditional grant of the new trial and direct that judgment be entered on the verdict." Advisory Committee Notes to Rule 50(c)(1).[9] Because the final judgment rule does not bar such a procedure in civil cases, the court of appeals found no reason why it should do so when a similar situation arises in a criminal case (Pet. App. A19-A20). The procedure described in Fed. R. Civ. P. 50(c)(1) is, of course, simply an application of the principle set forth in 28 U.S.C. 2106.

In the present case the court of appeals unquestionably had jurisdiction to review the district court's judgment of acquittal. See the authorities cited under point 1, *supra*. Thus, it also could review other orders that arguably were otherwise non-final and non-appealable. Review of both the judgment of acquittal and the conditional order of a new trial in this case required an evaluation of the evidence presented to the jury.[10] Reversal of the erroneous order of a

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not address situations that could arise only after the 1970 passage of the Criminal Appeals Act, 18 U.S.C. 3731.

[9]The Advisory Committee noted that this procedure had been followed by courts prior to the 1963 amendment that added subsection (c). See, *e.g.*, *Lind* v. *Schenley Industries, Inc.*, 278 F. 2d 79 (3d Cir.), cert. denied, 364 U.S. 835 (1960); *Moist Cold Refrigerator Co.* v. *Lou Johnson Co.*, 249 F. 2d 246 (9th Cir. 1957), cert. denied, 356 U.S. 968 (1958).

[10]See, *e.g.*, *General Motors Corp.* v. *City of New York*, 501 F. 2d 639, 648 (2d Cir. 1974) (appellate court should consider whether review of the appealable order will involve consideration of factors relevant to the otherwise non-appealable order).

new trial was in the interests of efficient litigation, since it resulted in saving the time the trial judge and the parties otherwise would expend in a retrial.[11] Therefore, it was plainly appropriate for the court to review both orders and remand for reinstatement of the jury's verdict.[12]

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[11]See, *e.g.*, *Hurwitz* v. *Directors Guild of America, Inc.*, 364 F. 2d 67 (2d Cir.), cert. denied, 385 U.S. 971 (1966) (noting obvious interest in economy of litigation underlying the pendent jurisdiction doctrine).

Petitioner cites *United States* v. *Dior*, *supra*, for the proposition that appellate review of new trial orders prior to retrial denies the district court the opportunity to correct its own mistakes (Pet. 28-29). But the only "mistake" petitioner cites in this case is the district court's admission of purchaser testimony. Because the court of appeals concluded that admission of this evidence was proper, there is no mistake to be corrected.

[12]We are aware of at least one other criminal appeal in which the court of appeals simultaneously reviewed a judgment of acquittal and the conditional order of a new trial that accompanied it. See *United States* v. *Brown*, 587 F. 2d 187 (5th Cir. 1979). The propriety of the court of appeals' exercise of pendent jurisdiction in the present case is not affected by the statement of this Court in *United States* v. *MacDonald*, 435 U.S. 850, 857 n.6 (1978), that it had concluded in *Abney* v. *United States*, 431 U.S. 651 (1977), that a court of appeals lacks pendent ju isdiction over otherwise non-appealable claims even when they are joined with a double jeopardy claim over which the appellate court has interlocutory appellate jurisdiction. The Court in *Abney* had concluded that the special nature of a double jeopardy claim brings it within the "collateral order" exception to the final judgment rule, but that similar considerations do not extend to most other interlocutory claims. The Court in *Abney* was concerned with the possibility that criminal defendants would assert frivolous double jeopardy claims in order prematurely to bring more serious, but otherwise non-appealable, questions to the court of appeals prior to conviction and sentence. 431 U.S. at 663. No such concern is present here, where the appeal was not from an interlocutory order, but from a final judgment of acquittal following a guilty verdict. See, *e.g.*, 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3937, at 95 n.5 (Supp. 1981).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

LOUIS M. FISCHER
Attorney

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